

DOCUMENT RESUME

ED 480 161

HE 036 107

AUTHOR Springer, Ann D.
TITLE Poised on the Precipice: The Michigan Cases and Affirmative Action in Higher Education.
INSTITUTION American Association of Univ. Professors, Washington, DC.
PUB DATE 2003-04-00
NOTE 13p.
AVAILABLE FROM For full text: <http://www.aaup.org/Legal/info%20outlines/legpoised.htm>.
PUB TYPE Reports - Descriptive (141)
EDRS PRICE EDRS Price MF01/PC01 Plus Postage.
DESCRIPTORS *Affirmative Action; *College Admission; *Court Litigation; Higher Education; Racial Distribution
IDENTIFIERS Michigan

ABSTRACT

This review comments on the recent class action suits in Michigan related to affirmative action and college admission. It reviews related cases and the legal basis for the Supreme Court decisions that are expected to have widespread effects. Affirmative action plans exist at all levels of government and business, and a broad ruling invalidating affirmative action could affect federal contracting, financial aid, minority business programs, housing loan programs, and other systems. Even a ruling upholding affirmative action will have wide reaching effects. If, for example, the Court were to uphold affirmative action in general, but find Michigan's plan to be insufficiently narrowly tailored, the practical effect would be to invalidate admissions systems at many institutions. Legal practices, however, are still likely to vary by state even after the Supreme Court rules. Potential effects are discussed for percentage plans and race based scholarships and programs. (Contains 12 references.) (SLD)

Poised On The Precipice: The Michigan Cases And Affirmative Action In Higher Education

Ann D. Springer
AAUP Associate Counsel
April 2003

I. Legal Background:

A. Current law governing affirmative action in admissions hinges on Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). (*Bakke*).

1. In *Bakke*, the Supreme Court was considering the challenge by Allan Bakke to admissions policies at the Medical School of the University of California. Justice Powell, speaking for a highly divided court, interpreted the 14th Amendment to the Constitution to find that racial and ethnic classifications are inherently suspect and call for exacting judicial scrutiny. He also held that the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions in some circumstances, but found that the California program's use of specific quotas went too far.

2. Ever since Justice Powell stated that a university could take race into account as one among a number of factors in student admissions for the purpose of achieving student body diversity, affirmative action programs in student admissions and financial aid, as well as in faculty employment, have largely been based on diversity. In the last decade, however, there have been increasing challenges to affirmative action programs, with courts debating the true meaning of Powell's opinion and the strength of the other justices support for that opinion, resulting in our current return to the Supreme Court 25 years later.

B. The 14th Amendment to the Constitution provides that "[n]o State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws."

1. This constitutional provision, and the standards the courts have developed to implement it, applies only to public institutions. However, some courts have stated that this standard is the same as the standard to be applied under Title VI, which would mean that the constitutional standard is applied to virtually all institutions, public and private.

2. Under the 14th Amendment, consideration of race or national origin is subject to "strict scrutiny," which requires that policies be "narrowly tailored" to achieve a "compelling government interest."

3. One major area of debate is what constitutes a "compelling interest." Compelling interests recognized under the law have included remedying the

present effects of past discrimination and the attainment of a diverse student body to further the "robust exchange of ideas" on campus. (See Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002)).

a. Remediation of past discrimination: Involves remediation of the present effects of past discrimination at that institution, thus it requires an admission of guilt specific to that institution.

b. Diversity

i. Based on the argument that a diverse student body is an important part of the "robust exchange of ideas," and that an institution, and the faculty who help run it, must be able to decide "for itself on academic grounds, who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-12 (1978)(quoting *Sweezy v. New Hampshire*, 354 U. S. 234 (1957)).

ii. Used more frequently by colleges and universities because it is premised on a positive need for the consideration of race and national origin that contributes to the educational mission, and because it does not require institutions to admit to past discrimination.

iii. Even if a compelling interest is shown, to pass constitutional muster an affirmative action plan must be "narrowly tailored." For an affirmative action program to be "narrowly tailored" under the law, the following factors must be considered: (1) the efficacy of alternative, "less intrusive" race-neutral approaches; (2) the extent, duration, and flexibility of race-conscious considerations; and (3) the burden on those who do not receive the benefit of any consideration of race. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wigand v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

C. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibits race and national origin discrimination by recipients of federal financial assistance. Because most colleges and universities accept federal financial aid and other federal money, this applies to most institutions. (For the regulations issued by the Department of Education implementing Title VI, see 34 C.F.R. Part 100. <<http://www.ed.gov/offices/OCR/regs/34cfr100.pdf>>). Some courts have found that the standards for analysis of Title VI are the same as those under the 14th Amendment to the Constitution. It is widely presumed that any Supreme Court decision on this issue would apply Title VI in much the same way as the 14th Amendment is applied. Thus the Supreme Court decision would affect public and private institutions.

II. Other Appellate Cases: In addition to the Michigan cases, there are three other major appellate court decisions on the issue of affirmative action in admissions.

A. *Hopwood v. University of Texas*: In 1992 four white applicants to the University of Texas School of Law filed a case alleging that the Law School's admissions policy of placing black and Mexican-American applicants in a separate applicant pool and accepting members of those groups over non-minority applicants with comparable records violated the equal protection clause of the Fourteenth Amendment. The district court held that separate evaluations for minority applicants were unconstitutional because they were not narrowly tailored to the state's compelling interest in diversity and in overcoming past discrimination. But the court also held that giving minority students a "plus" is lawful. *Hopwood v. State of Texas*, 861 F. Supp. 551 (W.D. Tex. 1994) (*Hopwood I*).

The Fifth Circuit reversed and remanded, holding that any consideration of race or ethnicity for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment, and that *Bakke* was not controlling precedent. *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996) (*Hopwood II*). The Fifth Circuit recognized remedying past discrimination as a compelling state interest, but decided that the applicable discrimination cannot be in the University as a whole, but must be specifically at the Law School. Finally, the court required the Law School to show that the plaintiffs would not have been admitted under a constitutional admissions system. The Supreme Court denied *certiorari*, noting that the challenged program was no longer in effect.

On remand, the district court awarded only minimal damages, and enjoined the Law School from taking racial preferences into consideration in admissions. *Hopwood v. State of Texas*, 999 F. Supp. 872 (W.D. Tex. 1998) (*Hopwood III*). Both sides appealed, and on December 21, 2000 the Fifth Circuit upheld the district court's conclusions that none of the plaintiffs would have been admitted even if a race neutral admissions process had been in place. The court reversed the injunction issued by the district court, finding that an injunction barring the University from "using racial preferences for any reason ... impermissibly conflicts with the square holding in *Bakke*." But the court did not overturn the first *Hopwood* decision, even though it noted that the first *Hopwood* panel went "beyond established Supreme Court precedent in several important respects," and employed "aggressive legal reasoning." The Supreme Court denied *certiorari*.

B. *Smith v. University of Washington*: A white female student sued the University of Washington in 1997, claiming that she was denied entry to the law school and that less qualified minority applicants were admitted over her because of the University's affirmative action policies. In November 1998 voters approved a state initiative to ban race-conscious affirmative action in the public sector, and the University announced that it was taking steps to suspend the consideration of race and gender in admissions. The federal district court then held that the state initiative made much of the case moot, including class-action claims seeking to declare the old admissions policy unconstitutional. However, the district court also held that the remaining discrimination claim should be decided based on principles enunciated in the Supreme Court's 1978 *Bakke* decision.

On December 4, 2000 the Ninth Circuit issued a ruling upholding the district court's decision and concluding that the principles set out in the *Bakke* decision govern. Applying *Bakke*, the Ninth Circuit held specifically that "the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and

educational diversity is a compelling governmental interest that meets the demands of strict-scrutiny of race-conscious measures." The Washington state law banning race-conscious affirmative action in public school admissions still remains in effect, however, and therefore the Ninth Circuit's decision does not apply in Washington state. The Supreme Court denied the petition for *certiorari*, leaving the Ninth Circuit's decision standing despite its direct contradiction of the Fifth Circuit's *Hopwood* decision.

After the Supreme Court's denial of *certiorari*, the case went back down to the district court for a decision on the merits, in accordance with the Ninth Circuit's decision that the law of *Bakke* would govern. On June 5th, 2002, the district court concluded that the Law School's admissions policies during the years in question (1994,1995,1996) were consistent with *Bakke*, and therefore constitutional. The court considered diversity to be a compelling state interest sufficient to survive constitutional scrutiny.

C. University of Georgia: The University of Georgia has been the subject of numerous discrimination lawsuits, many of which have been consolidated, separated and reconsidered. The main case, however, is the 1999 suit by a white female applicant (*Johnson*), alleging that her application was rejected because of her gender and race. Shortly after the suit was filed, the University of Georgia announced that it would stop giving an automatic preference in admissions to male applicants. The suit was consolidated with another suit challenging gender and racial issues, and the district court held in 2000 that the University's admissions policy was unconstitutional. The court found that under equal protection doctrine diversity does not rise to the level of a compelling interest because 1) there is no evidence that significant educational benefits are derived from racial and gender diversity, 2) there is no "principled stopping point" for taking race into account, and 3) that the argued compelling interest is based on stereotypes-namely the assumption that race and/or gender are a proxy for viewpoint or experience. *Johnson v. University of Georgia*, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).

On appeal the Eleventh Circuit upheld the district court decision, but for slightly different reasons. The court noted that to pass constitutional muster an affirmative action program must present both a compelling state interest and be narrowly tailored to meet that interest. The court then went on to conclude that it did not need to decide whether student body diversity was a compelling interest sufficient to justify race-based admissions programs in this case, because even assuming such diversity was a compelling interest, the UGA policy not sufficiently narrowly tailored to meet that interest. The court delineated a set of factors to consider in such cases. Any admissions program, the court opined, must be evaluated as to whether it "(1)...uses race in a rigid or mechanical way that does not take sufficient account of the different contributions to diversity that individual candidates may offer, (2) whether [it] fully and fairly takes account of race-neutral factors which may contribute to a diverse student body, (3) whether the policy gives an arbitrary or disproportionate benefit to members of the favored racial groups; and (4) whether the school has genuinely considered, and rejected as inadequate, race neutral alternatives...."

III. The Michigan Cases:

A. General Facts:

1. History: In the fall of 1997, two class action lawsuits were filed by the Center for Individual Rights (CIR) on behalf of white students denied

admission to the University of Michigan's undergraduate and law school programs. (*Gratz v. Bollinger, et al.* and *Grutter v. Bollinger et al.*) The suits allege that the University makes race too large a factor in admissions, in violation of the Constitution. The University argues that its use of race as a "plus" factor in admissions serves the compelling state interest of diversity in higher education and is therefore constitutionally valid.

a. The University of Michigan is a highly selective public institution founded in 1817. Its admissions system awards points to applicants for academic and non-academic factors, including race. Race is one of the many "plus" factors for which applicants are awarded points. The state's efforts have been quite successful in increasing minority representation within its programs over the past decade or so.

b. The Center for Individual Rights ("CIR") is a Washington, DC based public policy law firm whose founders envisioned it as a conservative version of the ACLU. It was founded in 1989 and has been conducting a nationwide campaign of lawsuits to dismantle affirmative action. CIR also represented the plaintiffs in the Texas and Washington cases.

2. Both cases have been certified as class actions for purposes of reviewing the policies at issue.

3. Both suits would hold administrators involved in admissions decisions personally liable under a federal statute (42 U.S.C. 1983) which provides recourse against persons who violate a plaintiff's civil rights "under color of law." Officials enjoy qualified immunity under that law, however, if they base their decisions in good faith on "objectively reasonable reliance on existing law."

B. Additional Parties:

1. The Intervenors: The University of Michigan is a public institution in a state with no history of *de jure* segregation. It must therefore rely on the diversity argument as its compelling state interest. However, the Sixth Circuit ruled in August 1999 that black and Hispanic students can intervene in the lawsuits to argue that the university needs affirmative-action policies in place to remedy its own racial discrimination (an argument disputed by the University itself). The intervenors are therefore considered a separate party, filing their own briefs and making separate arguments.

2. The Solicitor General: The Solicitor General of the United States can participate in Supreme Court cases where the United States has a particular interest. Here the issue at stake is interpretation of civil rights laws and the Constitution. Because the United States (through the Department of Justice and the Department of Education) has the authority to enforce civil rights laws, the Solicitor General has an "interest" to speak to. The Administration, after a much publicized debate, filed a brief arguing for the petitioners.

a. The administration's brief supports diversity, but argues that it can be achieved through "race neutral" means. It focuses on the legal requirement that any affirmative action plan be narrowly tailored, and the argument that readily available race neutral alternatives are one indication that the Michigan plan is not sufficiently narrowly tailored. The race neutral alternatives on which it relies are the "percentage plans" currently in place in Texas, California, and Florida. (See V. A below) The Administration also argues that the University's attempt to enroll a critical mass of minorities is the equivalent of a quota.

C. *Gratz v. Bollinger et al.*

1. *Gratz v. Bollinger et. al.* was filed on October 14, 1997, and was assigned to Judge Patrick Duggan in the U.S. District Court for the Eastern District of Michigan. It challenges the University's use of race in the admission process for its largest undergraduate college, the College of Literature, Science & the Arts. It is brought by Jennifer Gratz, an unsuccessful applicant for the 1995 Fall Term, and Patrick Hamacher, an unsuccessful applicant for the 1997 Fall Term.

2. District Court Opinion: Issued in December 2000, Judge Duggan's opinion finds diversity in higher education to be a compelling interest sufficient to survive strict scrutiny, and finds Michigan's current admissions program, which treats race as a "plus" factor, to be constitutional. Finding the "plus" factor constitutional under the standard set forth by Justice Powell in *Bakke*, the court noted that "the University's interest require[s] a sufficiently diverse student body and . . . [while] fixed racial quotas and racial balancing are not necessary to achieving that goal, the consideration of an applicant's race during the admissions process necessarily is."

3. Appellate Decision: This decision was appealed to the Sixth Circuit Court of Appeals, which held oral arguments in conjunction with the *Grutter* case before the whole court (*en banc*) on December 6, 2001. However, the Sixth Circuit has never issued a decision in the *Gratz* case.

4. Supreme Court: Despite the lack of an appellate decision, the plaintiffs took the unusual step of applying to the Supreme Court for *certiorari* without an appellate decision. This action, called a Rule 11 Writ of Certiorari, allows the Supreme Court to consider the *Gratz* case along with the *Grutter* law school case (below). On December 2, 2002, the Court did just that, granting certiorari in both *Gratz* and *Grutter*.

D. *Grutter v. Bollinger, et al.*:

1. *Grutter v. Bollinger, et. al.* was filed on December 3, 1997, and was assigned to Judge Bernard Friedman of the U.S. District Court for the Eastern District of Michigan. It challenges the University's use of race in its admissions process at the Law School and is brought by Barbara Grutter, an unsuccessful applicant for the 1997 Fall entering class.

2. District Court Decision: Issued on March 27, 2001, the 91 page opinion concludes that using race as one "plus" factor among many considered is not constitutional, and that "the law school's justification for using race--to assemble a racially diverse student population--is not a compelling state interest." Moreover, Judge Friedman states that "racial classifications are unconstitutional unless they are intended to remedy carefully documented effects of past discrimination," and then goes on to contradict even this narrow interpretation by stating that "an admissions policy that treats any applicants differently from others on account of their race is unfair and unconstitutional."

Judge Friedman repudiates Justice Powell's endorsement of diversity in higher education in the *Bakke* decision, concluding that "*Bakke* did not hold that a state educational institution's desire to assemble a racially diverse student body is a compelling government interest."

Judge Friedman also evaluated the University's use of race as one factor among many as an unconstitutional quota system. Noting that the law school admissions office tracked the race, among other factors, of those applicants admitted and those who had accepted, and that the University had admitted that it generally liked to have a class with a critical mass of somewhere around 10-17% historically underrepresented minorities, the court concluded that "there would be no need for this information to be characterized by race unless it were being used to insure that the target percentage is achieved." Thus the law school's process for tracking the progress of its class as the slots were filled, a common practice among many institutions, became "proof" of an unconstitutional quota system.

3. Appellate Decision: The Sixth Circuit issued a lengthy and contentious 5-4 decision on May 14th 2002 finding diversity in higher education to be a compelling interest sufficient to survive strict scrutiny, and finding Michigan's current law school admissions program, which treats race as one "plus" factor among many, to be constitutional. The court's decision overturned that of the district court. The Sixth Circuit conducted a detailed analysis of the Powell opinion and of the relative weight of the different opinions in *Bakke*. Referring to *Marks v. United States*, 430 U.S. 188, 193 (1977) and its requirement that "when a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," the court read the narrow holding of *Bakke* to include Justice Powell's recognition of a diverse student body as "essential to the quality of higher education" and as a compelling state interest.

The Sixth Circuit also concluded that the Law School's treatment of race as a "plus" factor, and its attempts to enroll a "critical mass" of underrepresented students, did not constitute a quota system but rather was an appropriate, narrowly tailored means of achieving the racial diversity necessary to a broad education. The court paid particular attention to the fact that the Michigan admissions system (which involves reading every application individually) closely tracks the "Harvard Plan" discussed in *Bakke*. Important to the court was the fact that both the Harvard Plan and the Law School's admission's plan treat race and ethnicity as "one element among other elements," and as such do not "operate to insulate any prospective student from competition with any

other applicants."

The Sixth Circuit was also not troubled by the fairly consistent percentage of minorities admitted to the law school each year, as the district court had been. Rather, the court noted that any system aiming at diversity will have some bottom and top number of admitted minorities, and that simply having an approximate range of minority students who are admitted each year does not turn the pursuit of a "critical mass" into a quota system. Finally, the court was not concerned by the apparent lack of a set end-point to the need for race based admissions consideration; it found the Law School's stated intention to consider race and ethnicity in admissions only until "it becomes possible to enroll a 'critical mass' of under-represented minority students through race-neutral means" to be a sufficient limitation.

The court's "narrow tailoring" analysis also paid particular deference to the "educational judgment and expertise of the Law School's faculty and admissions personnel." The court noted that it was ill-equipped to ascertain what race neutral alternatives will allow an institution to assemble a highly qualified and richly diverse academic class, and cited approvingly the U.S. Supreme Court's conclusion in *Regents of the University of Michigan v. Ewing* that a federal court is ill-suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public education institutions—decisions that require an expert evaluation of cumulative information and are not readily adapted to the procedural tools of judicial or administrative decision making."

4. Supreme Court: The plaintiffs appealed to the Supreme Court, and on December 2, 2002 the Court agreed to hear both University of Michigan cases, granting *certiorari* in both *Grutter* and *Gratz*.

IV. Potential Effects of the Supreme Court Ruling:

The effects of the Supreme Court ruling will be widespread.

A. Affirmative action plans exist in all levels of government and business. A broad ruling invalidating affirmative action could affect federal contracting, financial aid, minority business programs, housing loan programs and a myriad of other systems designed to create opportunities and diversity.

B. Even a ruling upholding affirmative action could have wide reaching effects. If, for example, the court upholds affirmative action in general, but finds Michigan's plan to be insufficiently narrowly tailored, the practical effect would be to invalidate admissions systems at many institutions.

C. Legal practices are still likely to vary by state even after the Supreme Court rules. Because some states have passed state laws restricting use of affirmative action, permissible practices will be different in those states even if the Supreme Court upholds the use of affirmative action in the Michigan cases.

1. Even in states where such laws are not in place, some institutions have taken

it upon themselves to restrict any racial preferences in their admissions process. (See, e.g., "Virginia Tech to Stop Considering Race or Gender in Decisions on Admission, Hiring and Aid," *The Chronicle of Higher Education*, March 12, 2003). Thus allowable admissions process will vary from state to state, and from institution to institution within each state.

D. Litigation on this issue will not end. If the Supreme Court's ruling is, as is widely expected, a split and hotly debated decision, then there will be much ongoing litigation to flesh out the parameters of the new holding, much as there has been for the last 20 years regarding *Bakke*. Even if the decision is clear, however, other programs like percentage plans and minority scholarship plans have been targeted for new litigation.

I. For example, CIR has already filed a class action lawsuit challenging hiring and promotion goals for women and minorities at the U.S. Department of Housing and Urban Development. The suit charges HUD and the Equal Employment Opportunity Commission with intentional race and sex discrimination in violation of the U.S. Constitution's equal protection guarantee.

V. Specific Issues Regarding Alternatives to Race Based Admissions:

A. Percentage Plans: One major area of debate has been the validity and viability of so called "percentage plans" as a race neutral way to provide diversity. Under these plans, a fixed percentage of the graduating class of each high school in the state is guaranteed admission to one or more universities in the state system. The plans are intended to replace race-conscious admissions systems while still achieving the goal of racial diversity in the student body.

1. The Solicitor General and CIR focus on the percentage plans in the three states that have tried this approach, California, Texas and Florida, as examples of race neutral options to increase diversity. They argue that the existence of such plans establishes that viable race neutral plans exist, and that the Michigan plan is thus not sufficiently narrowly tailored.

2. Recent research, however, shows concerns with the efficacy of such plans.

a. The U.S. Commission on Civil Rights recently analyzed college application, admission and enrollment data to determine if percentage plans can "achieve the goal of equal educational opportunity." The Commission concluded that "percentage plans alone do not improve diversity by reaching underrepresented minority groups and will only have their desired effect if affirmative action and other supplemental recruitment, admissions, and academic support programs remain in place."

b. The demographics of each state are different, and the results of these plans in various states would be uneven at best. California, Texas and Florida have large minority populations, while other states do not. In Michigan, for example, most underrepresented high schools are in rural, largely white areas of the state. The plans

also only work for universities that admit primarily from a statewide population. Public and private colleges and universities that recruit students from a national and international pool cannot apply this model to select their student bodies.

c. Percentage plans do not work to create diversity in graduate and professional programs.

d. The plans rely to some extent on a statewide university system, so that if students are not able to attend one university in the system they can enroll in another. Many state schools, and all private colleges, are not part of such a system. The plans also fail to improve minority representation at the most selective campuses such as University of California at Berkeley, UCLA, University of Texas at Austin, University of Florida and Florida State University.

3. Percentage plans also present significant policy drawbacks:

a. Percentage plans select high school students solely on the basis of their comparative ranking with classmates, discounting their leadership abilities, extracurricular activities, teacher recommendations, and all other individual characteristics that give a sense of their ability to participate in university and civic life.

b. Percentage plans work in enrolling minority students only because many high schools remain racially segregated, and therefore admitting the top percentage of students from minority high schools guarantees some number of minority students.

c. These plans take away the judgment of educators as to whether individual students are academically qualified for the level of work required at each college. Students in the top 10 percent of failing schools may be unprepared for college-level work and may require remedial support.

d. Plans that rely solely on class rank encourage students to avoid hard classes and more competitive schools, in order to superficially improve their GPA and class rank.

e. Percentage plans, if motivated by a desire to achieve racial diversity, may themselves be subject to constitutional scrutiny. The Center for Equal Opportunity, in its amicus brief in support of the plaintiffs in the Michigan cases, has asserted that such programs are unconstitutional because they are designed to ensure racial diversity.

B. Race Based Scholarships/Programs: The legal status of special programs designed to increase the pool of minorities qualified and financially able to attend prestigious colleges is also up in the air. Such programs include specific scholarships to minority students or

programs like internships, research fellowships, enrichment programs and summer camps.

1. The history of the legal validity of such programs has been a tortured one. The Fourth Circuit ruled on this issue in 1992 in *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992), *on remand*, 838 F. Supp. 1075 (D. Md. 1993), *vacated* 38 F.3d 147 (4th Cir. 1994), *reh'g en banc*, 46 F.3d 5 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995). In that case a Hispanic student challenged a merit-based scholarship program that was reserved solely for African-American students. The University established the plan as part of a desegregation plan to comply with the Civil Rights Act of 1964 and as a way to attract and retain minority students. The court held that race-conscious remedial measures are constitutional only if there is strong evidence that remedial action is necessary, and that the action is narrowly tailored to meet the remedial goal. While the University argued that the program was designed to remedy past discrimination, the court disagreed, and held that program was not narrowly tailored. The court ruled that it is not permissible for a college to rely on a poor reputation in the minority community or a racially hostile environment to show that the effects of prior discrimination are continuing, unless the college shows that this environment was caused by its own past actions and is not the result of general societal discrimination.

2. At about the same time as the *Podberesky* ruling, however, the Department of Education's Office for Civil Rights published new regulations seen as more favorable to minority scholarships than those previously in effect. Those regulations allowed federally funded colleges to use financial aid to promote diversity and access of minority students.

3. The Bush administration has not changed these regulations. However, a spokesman for the Education Department recently stated that "Generally, programs that use race or national origin as sole eligibility criteria are extremely difficult to defend." ("Dozens of Colleges May Soon Face New Federal Inquiries Over Race-Specific Programs," *The Chronicle of Higher Education*, February 27, 2003.)

4. A number of institutions have recently preemptively decided to stop offering such programs, even before a ruling by the Court in the Michigan cases. For example, public institutions in Massachusetts, Minnesota, Colorado, Virginia, Florida, Georgia and other private and public universities have either reconsidered, modified or abandoned such programs.

5. Three conservative advocacy organizations, CIR, the American Civil Rights Institute, and the National Association of Scholars, have announced efforts to find and challenge college programs that serve members of specified minority groups. The organizations plan to file complaints with the U.S. Education Department's Office for Civil Rights.

VI. Resources

Following is a list of resources helpful in this area:

Affirmative Action in Higher Education: A Report by the Council Committee on Discrimination, *AAUP Policy Documents & Reports* 193, 194 (9th ed., 2001).

Affirmative-Action Plans: Recommended Procedures for Increasing the Number of Minority Persons and Women on College and University Faculties, *AAUP Policy Documents & Reports* 201 (9th ed., 2001).

Alger, Jonathan R., *Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 *Washington University Journal of Urban and Contemporary Law* 73 (1998).

Bok, Derek. The Uncertain Future of Race-Sensitive Admissions, Revised Draft, January 20, 2003 (Posted on the National Association of College and University Attorneys website at <http://www.nacua.org/documents/Uncertain_Future_of_Race_Sensitive_Admissions_Revised.pdf>) (An excellent discussion of many of the issues surrounding affirmative action and admissions).

Coleman, Arthur L., *Diversity in Higher Education: A Strategic Planning and Policy Manual*, The College Board (2001).

Diversity Web: <<http://www.diversityweb.org/>> (University of Maryland & Association of American Colleges and Universities).

Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms, American Council on Education & American Association of University Professors (2000).

Minorities in Higher Education, American Council on Education (an annual report).

Springer, Ann D. and Baez, Benjamin, "Counterpoint: Affirmative Action is Not Discrimination." *The Chronicle of Higher Education*, December 6, 2002: B17.

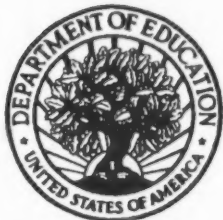
Springer, Ann, Update on Affirmative Action in Higher Education: A Current Legal Overview (maintained on AAUP's Website at: www.aaup.org/Issues/AffirmativeAction/aalegal.htm)

University of Michigan Website on Affirmative Action Admissions Cases <<http://www.umich.edu/~urel/admissions/>> (This website contains a wealth of information, including all of the legal filings in the cases, most of the amicus briefs, and references to resources and research on all related issues.)

Whitman, Robert S., *Affirmative Action on Campus: The Legal and Practical Challenges*, 24 *Journal of College and University Law* 637 (Spring 1998).

(Posted 04/03)

American Association of University Professors, 1012 Fourteenth Street, NW, Suite #500; Washington, DC 20005
202-737-5900 Fax: 202-737-5526
[AAUP Home Page](#) | [Contact Us](#)



*U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)*



NOTICE

Reproduction Basis

- ☒ This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.
- ☐ This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").